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MEMORANDUM FOR

Mr. Laurence Huston
General Counsel
Central Intelligence Agency

For your information.

Andrew F. Oehmann
Executive Assistant to the
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Enclosure

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Appointment of a retired Federal Judge to
Francis Gary Powers' Fact Finding Commission

This is in response to your request for my views as to whether a retired Federal judge may sit as a member of a fact finding board inquiring into the conduct of Francis Gary Powers while held as a prisoner by the Soviets. No legal objection appears to exist. However, certain policy questions should be considered.

Since no compensation is to be paid, statutes that bar a Federal officer from receiving dual compensation are not applicable. Nor would a retired judge vacate his judicial office if he served without compensation at the request of the President on the fact finding board. Cf. 40 Ops. A.G. 423 (1945).

It would be somewhat late to raise the objection that the doctrine of separation of powers would be violated by such an assignment since Federal judges, both retired and serving, have been used on non-judicial public matters almost from the beginning of the Nation. For example, Chief Justice Jay served as special envoy to England at the request of the President. Chief Justice Fuller twice acted as an arbitrator once in connection with a Venezuela-British Guiana boundary dispute, another time in a dispute over the right of the British to search small boats owned by the subjects of the Sultan of Muscat. 1/ Mr. Justice Roberts, at the request of President Roosevelt, participated in the investigation and the report concerning the circumstances surrounding the Pearl Harbor attack by the Japanese. While Charles Evans Hughes was a Justice of the Supreme Court he served on a Commission to determine the cost of handling second-class mail.

1/ Umbreit, Our Eleven Chief Justices, 354 (1938).

I understand that a question has been raised as to whether, by virtue of his position as a judge, such an individual could invoke executive privilege in connection with any congressional investigation into the Powers' matter. No precise precedent on this question has been found. However, since the judge would be serving in an investigative, i.e., executive, function and would be questioned with respect to that function, I do not perceive why his status as a judge should prevent assertion of the privilege. In addition, there is at least one instance in which a Justice of the Supreme Court refused to testify as to a matter in which he was involved while Attorney General on the ground that such testimony would be inconsistent with the doctrine of separation of powers. 2/ On the other hand, it is difficult to see how the President could have the same measure of control over a federal judge as he would over the ordinary personnel of the Executive Branch to compel exercise of the privilege.

Despite the existing precedents, and probably as a result of them, former Chief Justices, notably Hughes and Stone have expressed strong objection to use of Federal judges for service on committees or to perform other services not having a direct relationship to the work of the court. 3/ The basis of their objection was not, however, that these appointments violated the doctrine of separation of powers. Primarily, it was that when a Federal judge participates in the action of the Executive or Legislative branches he exposes the entire Federal judiciary into a realm of controversy and political attack which may impair the dignity of the office.

2/ Mr. Justice Clark in connection with the Harry Dexter White affair, N. Y. Times, June 18, 1953, pp. 1, 33; id. November 14, 1953, p. 9.

3/ 1 Pusey, Charles Evans Hughes, 296-97 (1951); Mason, Extra-Judicial Work for Judges: The View of Chief Justice Stone, 67 Harv. L. Rev. 193 (1953); Mason, Harlan Fiske Stone: Pillar of the Law, 704-719 (1956).

For similar reasons, including the doctrine of separation of powers, Chief Justice Warren opposed having members of the Supreme Court serve on a fact finding commission to determine Presidential Inability. 4/ The undesirable results arising from the appointment of Federal judges to extra-judicial duties in the Executive branch was also the subject of a critical report by the Senate Judiciary Committee in the 80th Congress. 5/ While the Committee was not disposed to recommend legislative action to curb the practice of using Federal judges for nonjudicial activities, it invited the Chief Executive to use his good sense and discretion in preserving the independence and prestige of the judiciary. Even though the report was directed at the use of active Federal judges for executive functions, some of the objections raised, such as possible impairment of the Court's influence and character, would apply as well to retired judges who are often called upon to perform judicial duties.

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4 / Letter of Chief Justice Warren to Hon. Kenneth B. Keating, Jan. 20, 1958 which read in part as follows:

> "It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission."

(Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary U. S. Senate, 85th Cong. on S.J. Res. 100 etc. 14 (1958).

5 / S. Exec. Rept. No. 7, 80th Cong. 1st Sess. reprinted in 33 A.B.A.J. 792 (1947). A passing reference is made to preserving the independence of judges as a foundation for upholding the doctrine of separation of powers, but the Committee does not conclude that such appointments violate the doctrine Id. 793.

Weighed against these important objections there is, of course, the advantage in having a retired Federal judge with years of experience, who is objective and fair enough to sit on a fact finding board concerned with the country's safety and security. His presence may not only tend to assure that the facts will be fully elicited in the public interest, but also that the rights of the individual involved will be fully protected.

I would like to make two further observations. In this investigation there is the possibility of involving a judge in matters which may have been before a Congressional committee and it is always possible that the Committee could question his judgment. I think it is undesirable to expose a judge to such a possibility, although it has been done before and is not, by itself, a conclusive objection. Secondly, there is the possibility that the findings of this panel will be subjected to further judicial scrutiny. It might be embarrassing for a judge to have his findings in an executive role subject to review by his judicial brethren. In addition, the use of Federal judges on a panel of this kind might be attacked as an attempt to influence the judiciary should the matter actually go to trial.

Conclusion

In my opinion, there is no legal impediment to appointing a Federal judge to the proposed fact finding board. The public interest requires a complete and fair investigation in this unique case and perhaps the objections stated above to the use of judges in nonjudicial capacities and the special problems this matter presents are out-weighed. At the same time, I believe the appointment of an outstanding member of the Bar would accomplish the same results without incurring the risks discussed herein.

Whitney North Seymour, Jr.

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